

# ***LUNENBURG PLANNING BOARD TOWN OF LUNENBURG***

Emerick R. Bakaysa, Chair  
Joanna L. Bilotta-Simeone, Vice-Chair  
Thomas W. Bodkin, Jr., Clk.  
Robert J. Saiia, Mbr.  
Nathan J. Lockwood, Mbr.  
Marion M. Benson, Planning Director



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Minutes  
June 13, 2012

Meeting Posted: Yes

Place: Ritter Memorial Building, 960 Massachusetts Avenue, Lunenburg, MA 01462

Time: 6:00 PM

Present: Emerick R. Bakaysa, Joanna L. Bilotta-Simeone, Thomas W. Bodkin Jr. Robert J. Saiia, Nathan J. Lockwood, Marion M. Benson

Also present: Joel Bard, Town Counsel

## **EPG Solar Development Plan Review-**

Attorney Bard was present to discuss how the solar process changed with the new solar bylaw that was voted at May 2012 Town Meeting. He talked about EPG Solar as the Board is wrapping up the DPR (Development Plan Review), but he wanted to make it clear to the citizens that he was talking about it procedurally. The point of the Board meeting was to talk procedurally/legally the effect of the bylaw change.

EPG filed for DPR with the Board. Discussion was then held regarding the zoning bylaw in effect at that time that governed solar facilities in Lunenburg. Attorney Bard gave the opinion that the existing Solar Bylaw only created performance standards and did not regulate solar usage. Ch. 40A Section 3 states that you cannot prohibit usage. He noted that Lunenburg's Solar Bylaw stated any use not permitted was prohibited. Under Ch. 40A Section 3 there would be a problem as this would essentially mean they could locate anywhere in Town. May 5, 2012 Town Meeting voted to adopt the new Solar Bylaw. Prior to that Town Meeting, the property owner filed an ANR Plan which the Board endorsed. The effect of that was to freeze the zoning under the subdivision control law. The Zoning Act states that a plan that is endorsed – the land shown on such plan is entitled to protection of use as those uses that are permitted at that time under the Zoning Bylaw. The property owner could make the argument that use was allowed anywhere in Lunenburg. With the passage of the new Solar Bylaw, other than the three sites listed in that Bylaw, any other site must have at least 20 acres, and obtain a special permit.

Lunenburg is currently awaiting approval of the Solar Bylaw from the Attorney General's Office. Once a zoning bylaw is passed at Town Meeting, it becomes immediately effective. The Attorney General may disapprove at some point, and if so, it will be retroactive to Town Meeting.

As the Applicant has not withdrawn its application, Attorney Bard advised the Board to act on the DPR. The review would be under the old Solar Bylaw. Attorney Bard advised the Board to note in its Determination that this is reviewed under the old Bylaw, but also note there is a new Bylaw in effect, note the dimensional regulations that apply, and that those will be reviewed through the special permit process.

When an ANR Plan receives Planning Board endorsement, the "use" of the land shown on the plan is protected for three years from the date of the endorsement. The use was allowed as-of-right. It now requires a special permit. Attorney Bard's opinion is the Applicant does not need a special permit for the use, but procedurally he advises they be required to file a special permit. If EPG applies for a special permit, the issue that will be significant will be the application of the 200 foot setback requirement under the new Bylaw. The Applicant may say that is not reasonable for the Board to apply that requirement as it will nullify the use. Ch. 40A Section 3 states that you cannot unreasonably prohibit or regulate. The decision the Planning Board has to make is, 1) is the application of the 200 foot requirement reasonable under Ch. 40A Section 3, and 2) if the Board applies the 200 foot setback, is that having the effect of nullifying the use.

Attorney Bard reiterated that it is important to state in the Determination that the DPR is under the old Solar Bylaw and that the Board believes the Applicant must return and apply for a special permit under the new Solar Bylaw. His opinion is there is no right of appeal from the DPR decision. The DPR is a precursor to a building permit. If a building permit is denied, then the Applicant can appeal the denial to the Zoning Board of Appeals on the grounds there was no right to have denied them because they don't have to get a special permit.

Attorney Bard's opinion is that if the Special Permit is granted as the use is allowed, and the Board is willing to waive the 200 foot setback, the Determination could state that based on the language of Ch. 40A Section 3 that states they cannot unreasonably regulate, the Board finds it would be unreasonable to impose the 200 foot requirement, therefore allowing, e.g., 100 feet.

Mr. Bakaysa was of the opinion that there were three elements to consider-

- THE DEVELOPER'S RIGHT TO DEVELOP UNDER THE AS-OF-RIGHT BYLAW
- PROTECTING THE NEIGHBORHOOD
- FOR THE TOWN - AN ANNUITY STREAM OF REVENUE FROM THE PROJECT WHICH IS GOOD FOR THE OVERALL COMMUNITY

The Reviewing Engineer and the Applicant need to determine a reasonable scope of work for a plan that does not unreasonably regulate/prohibit the project.

Attorney Bard – The DPR cannot be converted to a special permit. The DPR process can be suspended and the Applicant apply for a special permit. The new buffers/setbacks have to go through a special permit process.

Jason Talerman, Esq., Blatman, Bobrowski & Mead, LLC, attorney for EPG Solar- Would like to see the DPR process brought to completion. Working closely with EPG on an accelerated schedule - would recommend to EPG to immediately apply for a special permit. EPG willing to have discussion on Board concerns.

Ms. Bilotta-Simeone expressed concern over waiving the 200 foot setbacks.

Of paramount importance to Mr. Bakaysa were concessions to abutting neighbors. He inquired of Attorney Bard if a Directive is needed requiring EPG to return for a special permit. Attorney Bard – no.

Mr. Lockwood inquired if approving the current Determination under the old Solar Bylaw, would compromise the Board's position. Attorney Bard noted there will be a new set of ground-rules under a special permit.

Citizens present had various concerns.

Attorney Bard clarified to a citizen that to be locked into the old bylaw it would have been necessary for the Applicant to have a building permit approval prior to the Board's newspaper publishing of the Public Hearing for the bylaw change.

Attorney Bard noted that under the ANR endorsement, the use cannot be denied. Once the Board has reviewed new plans submitted under a special permit, if the Board chooses to adhere to the 200 foot setback and the applicant states they cannot build the project due to such, then the burden is on the applicant to demonstrate why their project is no longer feasible.

Citizen concerned that Determination may not state what Board is looking for, e.g., moving the project away from the neighborhood. Guidance needs to be incorporated into the Determination to give the Applicant the data they need to come back under a special permit.

Ms. Benson noted that she has received requests from EPG Solar for a copy of the draft DPR. Attorney Bard responded that it can be released.

Mr. Bakaysa wanted to make clear to the audience that the economic feasibility for a developer is not a concern to the Planning Board. The Board looks at a plan for its compliance with the bylaw.

**ANR- Alice Heikkila, 651 Chase Road-** Motion to endorse Plan, Ms. Bilotta-Simeone, Second, Mr. Bodkin Jr., Motion passed.

**ADJOURNMENT:** 8:30 PM.